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POLITICS AND TAXATION: AN INTRODUCTION

by

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Politics and Taxation: An Introduction

ERIC M. ZOLT*

I. Introduction

The United States was founded in part on the slogan "no taxation without representation."[1] Had the founding fathers witnessed what taxation with representation looks like, they might have chosen a different slogan. While there have been major advances in understanding the relationship between politics and taxation, there is still much we do not know. Part of the challenge is the interdisciplinary nature of politics and taxation. This topic has drawn interest from sociologists, political scientists, economists, and law professors, so it is unsurprising that the authors and commentators in this Issue come from several different disciplines.

Understanding the relationship between politics and taxation is important for several reasons. It may help explain why countries adopt different taxing and spending patterns. For example, why do countries differ in the relative level of taxation (tax-to-GDP levels) and the relative use of different tax instruments (personal income taxes, corporate taxes, consumption taxes, or trade taxes)?[2] It also may explain why the frequency, success, and stability of tax reform efforts vary greatly among countries, particularly between developed and developing countries.[3] Finally, a better understanding of politics and taxation may also provide insights into such questions as how institutions shape

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[1] The exact origin of the phrase "no taxation without representation" is uncertain, though credit for the phrase is often attributed to either Boston legislator James Otis, Jr. or Reverend Johnathan Mayhew. See J.L. Bell, Irish Roots for "Taxation without Representation"?, Boston 1775 (Dec. 22, 2012), http://boston1775.blogspot.com/2012/12/irish-roots-for-taxation-without.html. For a comprehensive review of tax systems in colonial America, see Alvin Rabushka, Taxation in Colonial America (2008).

[2] See B. Guy Peters, The Politics of Taxation: A Comparative Perspective (1991); Steffen Ganghof, The Politics of Income Taxation: A Comparative Analysis (2006).

[3] See generally Mick Moore, Obstacles to Increasing Tax Revenues in Low Income Countries (Int'l Ctr. for Tax and Dev., Working Paper No. 15, 2013), available at http://ictd.ac/sites/default/files/ICTD%20WP15.pdf.

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policy outcomes[4] and how tax policy may contribute to successful democratic governments.[5]

While some scholars have examined how political forces shape tax policy,[6] much tax scholarship still implicitly assumes an "autonomous state" model whereby governments have sufficient coercive power to design and enforce tax regimes, avoiding the messiness of politics in tax design. Theories as different as optimal tax theory and leviathan theory of taxation share this common assumption. Optimal tax theory treats the state as a benevolent social planner seeking to use the tax system to maximize the welfare of its citizens.[7] Leviathan theories posit the government as a revenue-maximizer that uses its monopoly power of taxation to increase the size of government to greater levels than citizens' preferences.[8] While this approach of cabining off political considerations is not limited to tax design,[9] successful translation of theory into policy requires a better understanding of politics and taxation.[10]

Early models of the relationship between politics and taxation grew out of feudal traditions.[11] First, powerful kings and nobles extracted tax revenue to protect residents from outside invaders. In later models, kings bargained with nobles for more secure property rights and some influence over government policy in exchange for tax revenue.[12] Rulers' need for revenue to fight wars called for changes in the types and level of taxes collected as well as the mechanisms for collecting taxes. It also contributed to changes in the type of concessions extracted by citizens.[13]

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[4] See generally Mancur Olson, Jr., Distinguished Lecture on Economics in Government: Big Bills Left on the Sidewalk: Why Some Nations Are Rich, and Others Poor, J. Econ. Persp., Spring 1996, at 3.

[5] See generally Taxation and State-Building in Developing Countries: Capacity and Consent (Deborah A. Bräutigam, Odd-Helge Fjeldstad & Mick Moore eds., 2008).

[6] W. Elliot Brownlee, Federal Taxation in America: A Short History (2d ed. 2004); Peters, note 2, at 125-45; Steven R. Weisman, The Great Tax Wars (2002); John F. Witte, The Politics and Development of the Federal Income Tax (1986). R

[7] J.A. Mirrlees, An Exploration in the Theory of Optimum Income Taxation, 38 Rev. Econ. Stud. 175, 176 (1971).

[8] Geoffrey Brennan & James M. Buchanan, The Power to Tax: Analytical Foundations of a Fiscal Constitution 26-27 (1980).

[9] Daron Acemoglu & James A. Robinson, Economics Versus Politics: Pitfalls of Policy Advice, J. Econ. Persp., Spring 2013, at 173.

[10] N. Gregory Mankiw, Matthew C. Weinzierl & Danny Yagan, Optimal Taxation in Theory and Practice, J. Econ. Persp., Fall 2009, at 147.

[11] Margaret Levi, Of Rule and Revenue 14 (1988).

[12] Robert H. Bates & Da-Hsiang Donald Lien, A Note on Taxation, Development, and Representative Government, 14 Pol. & Soc'y 53, 57 (1985).

[13] Levi, note 11, at 105-18. For a discussion of U.S. taxation during times of war, see Steven A. Bank, Kirk J. Stark & Joseph J. Thorndike, War and Taxes (2008). R

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The ability to generate tax revenue is one of the key components in the formation of the modern state.[14] Collective goods and services require state funding, and absent state-owned mineral resources, taxes are the major source of revenue. But collecting taxes is costly, and taxpayers have strong incentives for noncompliance. Under the "fiscal contract" approach, states have an interest in trading services preferred by taxpayers for higher levels of tax compliance. The state thus can be viewed as a discriminating monopolist seeking to trade tax revenue for spending programs that are important to those who pay the bulk of the taxes.[15] Changing preferences for services may alter the nature of the fiscal contract. As illustrated by recent changes in fiscal policy in Latin America, the growth of the middle class and reduction in levels of inequality may lead to a new fiscal contract that results in higher taxes on the middle class in exchange for increased spending on the social services that they prefer.[16]

Modern variations of the taxation and representation approach seek to explain how and when the need for greater tax revenue forces governments to democratize.[17] Governments with substantial revenue from mineral resources (oil, gas, copper, diamonds) and from foreign assistance have relatively low tax revenue requirements and therefore relatively little need to impose taxes on their residents. With relatively low tax burdens, the public has less reason to demand representation and accountability. Under this view, foreign aid to authoritarian governments has antidemocratic effects and, conversely, measures that force these governments to increase taxes increase chances for more democratic government. While the mechanism and direction of causation is hard to establish (does taxation lead to democracy, or does democracy lead to taxation), it appears that governments that have relatively high levels of taxation have higher levels and quality of democratic participation.[18]

How governments raise tax revenue has different consequences for different parts of the population. So it is not surprising that the relative power of different interest groups will strongly influence tax design. While some tax scholars consider tax reform and the middle

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[14] Joseph Schumpeter, The Crisis of the Tax State (1918).

[15] Jeffrey F. Timmons, The Fiscal Contract: States, Taxes, and Public Services, 57 World Pol. 530, 530 (2005).

[16] Richard M. Bird & Eric M. Zolt, Taxation, Inequality and Fiscal Contracting in Latin America 16 (UCLA Sch. of Law, Law-Econ. Research Paper No. 13-14, 2013).

[17] Michael L. Ross, Does Taxation Lead to Representation?, 34 Brit. J. Pol. Sci. 229 (2004).

[18] See Jeffrey F. Timmons, Taxation and Representation in Recent History, 72 J. Pol. 191 (2010). Interestingly, Timmons finds that greater democratization leads to higher revenues from consumption taxes but not from progressive taxes on income and capital. Id. at 203.

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class,[19] in recent years the primary focus has been on the appropriate tax burden on the top 1%[20] and the nonincome taxation of the bottom half of the population.[21]

The first article, by Lawrence Zelenak, focuses on Mitt Romney's controversial remarks in the 2012 presidential campaign about "47 percent of Americans [who] pay no income tax."[22] In a video of Romney speaking to a group of wealthy donors, he said: "There are 47 percent of the people who will vote for the president no matter what. There are 47 percent who are with him, who are dependent upon government, who believe that government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you-name-it . . . These are people who pay no income tax."[23]

Zelenak begins by tracing the origin of the statistic to a Tax Policy Center 2009 report that estimated that 47% of households in the United States would owe no federal income tax that year.[24] The statistic went viral as Tax Day 2010 drew near, drawing commentary from conservatives and moderates.[25] Even after the 2010 tax season passed, the issue remained a central one to many media figures, politicians, and commentators, and the frequent use of the 47% figure in the conservative sphere likely led Romney to include it in his remarks.[26]

While the optimal percentage of the population that should be required to pay federal income tax is an important and interesting question, Romney's linkage of those who do not pay taxes and those who receive government benefits arguably painted almost half of all Amer-

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[19] Kirk J. Stark & Eric M. Zolt, Tax Reform and the American Middle Class, 40 Pepp. L. Rev. 1209 (2013).

[20] Compare Peter Diamond & Emmanuel Saez, The Case for a Progressive Tax: From Basic Research to Policy Recommendations, J. Econ. Persp., Fall 2011, at 165, with N. Gregory Mankiw, Defending the One Percent, J. Econ. Persp., Summer 2013, at 21.

[21] Roberton Williams, Who Pays No Income Tax?, 123 Tax Notes 1583 (2009).

[22] Lawrence Zelenak, Mitt Romney, The 47 Percent, and the Future of the Mass Income Tax, 67 Tax L. Rev. 471 (2014).

[23] Full Transcript of the Mitt Romney Secret Video, Mother Jones (Sept. 19, 2012, 4:00 AM), http://www.motherjones.com/politics/2012/09/full-transcript-mitt-romney-secret-video.

[24] The 47% included households with income low enough that they were not required to file a return as well as households who were tax filers but not taxpayers, a status generally reached through tax credits. Williams, note 21, at 1583. While the percentage of households not paying income tax spiked in 2008 with the beginning of the recession, the reduction is part of a long-term trend. According to the IRS, the percentage of individual taxable returns fell from 81.5% in 1986 to 58.3% in 2009. Zelenak, note 22, at 474 (citing Adrian Dungan & Michael Parisi, Individual Income Tax Rates and Shares, 2010, IRS, Stat. Income Bull., Winter 2013, at 18, 20, fig.A (2013). R

[25] Zelenak, note 22, at 474–75.

[26] Id. at 477.

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icans as "lazy moochers."[27] Zelenak contends that this failure to separate the issues of who pays taxes and who receives government benefits likely prevented a more reasoned debate about what percentage of Americans should be required to pay income taxes.

Some conservatives defended Romney's comments, claiming all Americans should contribute some amount, even if minimal, in order to have some "skin in the game."[28] What Zelenak finds surprising is the number of conservative commentators who did not share the disdain for the nontaxpaying group. Commentators noted that it was not clear a strong conservative case exists for shrinking the 47% as many of the nontaxpaying households had no liability because of their extremely low income or because of their use of tax credits (particularly the earned income tax credit), credits that continue to have strong Republican support.[29] Romney ultimately retracted his statement in its entirety, with regard to both the contempt for the nonpaying group and the position on federal tax policy, calling them "completely wrong."[30]

Zelenak concludes with a discussion of whether the percentage of the population paying income tax will again emerge as a relevant political issue. He finds it unlikely partly because of a lack of concern among the general public as evidenced by the reaction to the Romney video,[31] and partly because of the likely increase of the taxpaying population as the economy improves over time, even without new legislation.[32]

In her commentary, Deborah Schenk reviews the justification for a mass tax based on notions of fiscal citizenship.[33] She observes that the attractiveness of a broad base of taxpayers has a long and bipartisan history.[34] Requiring all citizens with income above the poverty level to contribute and pay at least some tax increases their awareness of the cost of government and provides incentives for citizens to monitor and discipline government officials responsible for expenditure programs.

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[27] Id. at 472.

[28] Id. at 475 (quoting Scott A. Hodge, Why More Americans Pay No Income Tax, CNN .com (Apr. 15, 2010, 9:46 AM), http://www.cnn.com/2010/OPINION/04/15/hodge.non.taxpayers/.

[29] Id. at 485.

[30] Philip Rucker, Romney: "47%" Remarks Were "Completely Wrong," Wash. Post, Oct. 5, 2012, http://www.washingtonpost.com/politics/decision2012/romney-47-percent-remarks-were-completely-wrong/2012/10/05/a346beaa-0ed8-11e2-a310-2363842b7057_story.html.

[31] Id. at 498.

[32] Id.

[33] Deborah H. Schenk, Commentary, Debate About a Mass Income Tax Is Not Over, 67 Tax L. Rev. 501 (2014).

[34] Id. at 502–03.

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Like Zelenak, Schenk finds that Mitt Romney's comments prevented, rather than facilitated, a discussion of the appropriate number of households that should be required to pay federal income tax. While Romney appeared to assume the groups of nontaxpayers and net takers completely overlapped, Schenk relies on set theory to map out the relationship between those paying no income tax and those receiving net benefits.[35] Her use of Venn diagrams nicely highlights both the union of the two groups (the aggregate number of either persons paying no income tax or persons receiving net benefits from government programs), and perhaps more importantly, the area of intersection.

Zelenak and Schenk probably agree that the likelihood of reasoned public debate about tax issues (as well as many other types of issues) is quite small in our current political environment. But where they differ is whether the day for a meaningful discussion of the appropriate percentage of taxpayers has come and gone. Schenk takes issue with Zelenak's prediction that the population covered by federal tax is destined to be a political nonissue.[36] As discussed above, Zelenak offers two reasons to support his prediction: first, the failure of public reaction to the Romney video demonstrates a lack of concern over the coverage of the income tax; and second, that the improving economy will increase the percentage of the taxpaying population. Schenk challenges Zelenak on both grounds. Schenk notes the difficulty of predicting which tax issue might capture the public's attention, highlighting the fortuitous and almost random quality of past triggering events.[37] She also contends that the mass tax versus class tax issue can arise even when the percentage of the taxpaying population increases above current levels.[38]

The politics of taxation takes place at all levels of government: local, state, and federal, and increasingly across national borders, as well as between voters and their elected representatives. A substantial "fiscal federalism" literature examines the relative taxing and spending authority among national and subnational levels of government, both in the developed and developing country contexts.[39] The focus on subnational government helps illuminate how, and under what as-

[35] Id. at 504.

[36] Id. at 501.

[37] Id. at 501 n. 4 & 502.

[38] Id. at 505.

[39] See Wallace E. Oates, Fiscal Federalism (1972); Fiscal Decentralization in Developing Countries (Richard M. Bird & Francois Vaillancourt eds., 1998).

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sumptions, voter preferences can dictate levels of taxes and spending decisions.[40]

While voters generally express their fiscal choices through their elected representatives, sometimes, and in some places, voters use "direct democracy" to constrain legislative action on tax and spending policies. The second article, by Colin H. McCubbins and Mathew McCubbins, examines the effectiveness of voter initiatives and propositions in limiting the taxing power of elected officials.[41] Tax limitations are voter initiatives that seek to limit state taxes, expenditure, and debt. The authors find that tax limitations are likely to be ineffective when voter interests are against those of legislators, and almost always fail to reduce state taxes or expenditures.[42]

The article highlights the divide in the existing literature on tax limitations. One strand views initiatives as an effective voter check on legislative power, painting initiatives as a "policymaking game between voters, legislatures, and initiative proponents."[43] Here, voters seek to move fiscal policy away from the legislature's preferred position.[44] An alternative view finds the initiative process to be mostly symbolic.[45] As the public has great difficulty in implementing and overseeing tax limitations, initiatives are unlikely to be effective when left to legislators to implement.[46]

McCubbins and McCubbins seek to improve on existing approaches to measure the effectiveness of tax limitation measures by using the synthetic control method. They construct a synthetic counterfactual for each tax limitation state by using data from a weighted pool of states that did not pass a tax limitation.[47] McCubbins and McCubbins can use the synthetic control as a baseline against which to measure the effects of implementing a tax limitation. They also use placebo tests to construct a synthetic control case for each state without tax

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[40] See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 418 (1956).

[41] Colin H. McCubbins & Mathew D. McCubbins, Cheating on Their Taxes: When Are Tax Limitations Effective at Limiting State Taxes, Expenditures, and Budgets?, 67 Tax L. Rev. 507 (2014).

[42] Id. at 510.

[43] Id. at 511.

[44] Id.

[45] Id. at 511–12.

[46] The authors also observe that the divide may result from choice of methodology. The first approach traditionally uses large panels and pooled regression models to estimate the average effects of tax and expenditure limitations. Because different states have different initiative processes, comparing data across states is challenging. Id. at 512–13.

[47] The authors examine the effects of tax limitations on real total tax revenue per capita, on real property tax revenue per capita, and on real expenditure per capita by the state. They also estimate the effects of specific property tax limitations on real property tax revenue per capita and on real total tax revenue per capita. Id. at 518.

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limitations to capture exogenous economic, political, historical, and demographic factors.[48]

McCubbins and McCubbins find that the "behavior of the legislature rarely changes following the implementation of tax limitations. Likewise, government spending does not decrease, nor is debt reduced . . . [tax expenditure limitations] do not constrain government taxes or spending."[49] Tough tax limitations are likely to be effective only when a supporting political party holds office or when an agency outside of the legislature has authority to adopt or monitor the tax limitation. The initiative process fails to achieve intended results because voters lack power to enforce or oversee implementation of tax limitations.

In his commentary, Kirk Stark provides an overview of McCubbins and McCubbins' empirical results and an alternative explanation for how to interpret these results.[50] While Stark has no truck with McCubbins and McCubbins' methodical approach and their findings that no empirical basis exists for concluding that tax limitations will result in lower total tax revenues, lower property tax revenues, or total expenditures, he challenges the conclusions that McCubbins and McCubbins draw from these findings.

In the McCubbins and McCubbins story, the failure of voter initiatives to reduce the size of government shows that elected officials ignore the preferences of their constituents. McCubbins and McCubbins view this as a problem of agency failure as legislatures blatantly "cheat on their taxes" by discarding the public desires for lower taxes and smaller government and adopting their own preferred mix of taxing and spending policies.[51]

Stark tells a different story. Rather than focus solely on voter initiatives that seek to limit legislative taxing power, he examines a whole range of direct democracy initiatives that draws a more complex, and often conflicting, picture of how voters express their fiscal preferences. Stark uses California's voter initiative history to illustrate how voters send mixed messages to their elected officials.[52] Yes, voters impose limitations of taxing authority (most famously, Proposition 13[53]), but they also vote to mandate higher levels of government ex-

[48] Id. at 516–17.

[49] Id. at 542.

[50] Kirk J. Stark, Commentary, The Operation of Tax Limitation Initiatives in the Face of Conflicting Voter Preferences for Tax and Spending Levels, 67 Tax L. Rev. 543 (2014).

[51] McCubbins & McCubbins, note 41. R

[52] Stark, note 50, at 547–53. R

[53] Cal. Const. art. XIII A.

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penditures (for example, Proposition 98[54]), as well as a high approval rate for substantial bond measures and local tax increases.[55]

For Stark, the failure of tax limitation initiatives to reduce tax revenues does not reflect a failure of elected officials to follow the will of the people, but rather supports a view that the voters are actively engaged in the fiscal decisionmaking, but with different, and often conflicting, preferences.[56] Here, the conflict is not between voters and their elected representatives, but rather between those voters who prefer lower taxes and smaller government and those who support higher taxing and spending levels.[57]

Many strands of tax scholarship look at political institutions, such as the role of government bureaucracies or the tax legislative process. For example, scholars examine how institutions influence policy outcomes, comparing the relative tax policies of countries with parliamentary rather than presidential systems.[58] In addition, a substantial literature examines the incentives to both individual legislators and legislative coalitions in pushing for tax policy changes. Under these state-capture theories, different interest groups (such as industry groups, organized labor, NASCAR, and medical device manufacturers) co-opt congressmen to push for tax preferences at the expense of other taxpayers.[59] Later scholars have provided substantially richer explanations of policy changes by incorporating other factors that influence behavior of congressmen besides the need to raise funds for re-election.[60]

In a timely article, Michael Doran examines existing theories seeking to understand the tax legislative process and considers additional factors that may explain legislative behavior in the contemporary U.S. Congress.[61] Doran contends that tax legislation has changed since the late 1990's from long, complex, particularistic legislation to a shorter, cleaner, and more absolute form.[62] Doran also finds greater gridlock in tax legislation over the last twenty-five years than in prior periods.

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[54] California Ballot Pamphlet, General Election, November 8, 1998, at 78-79, http://librarysource.uchastings.edu/ballot_pdf/1988g.pdf (Proposition 98: School Funding).

[55] Stark, note 50, at 549.

[56] Id. at 548.

[57] Id. At 553.

[58] See, e.g., Sven Steinmo, Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State (1993).

[59] See, e.g., Richard L. Doernberg & Fred S. McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 Minn. L. Rev. 913, 930-31 (1987).

[60] See, e.g., Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 80-94 (1990).

[61] Michael Doran, Tax Legislation in the Contemporary U.S. Congress, 67 Tax L. Rev. 555 (2014).

[62] Id. at 556.

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Doran contends the two trends are inter-related and that in many ways "tax gridlock and nonparticularistic legislation are two sides of the same coin."[63]

Scholars have used both traditional policy explanations and legislator-motivation explanations to better understand the tax legislative process. One traditional policy explanation for the long, complex, particularistic legislation is that it reflects the cyclical battle between "tax instrumentalism," in which Congress uses taxes to promote economic and social goals, and "tax reform," in which Congress removes such provisions from the law.[64] Particularistic legislation has also been explained by legislator motivations. Doernberg and McChesney's application of public choice theory to tax legislation posits that government creates legislation in response to demand, which is crafted and paid for by private interest groups.[65] Particularistic tax legislation results when legislators trade targeted favorable tax treatment for campaign contributions and other perquisites.

Doran contends that these approaches fail to explain the new legislative process.[66] They do not adequately explain either the move away from particularistic legislation or the emergence of tax gridlock. While tax policy explanations and legislator-motivation explanations remain useful in examining tax legislative outcomes, the explanations also remain largely constant through time.

Doran's contribution is a new, broader framework for understanding the tax legislative process. Doran contends that three elements influence tax legislation outcomes. First, exogenous events, including macroeconomic or macropolitical events, influence the timing and design of tax legislation and may illuminate the central policy objective of a tax statute.[67] Second, legislator motivations continue to play a major role.[68] Third, and most importantly, Doran claims "three institutional developments within Congress that coincided in the 1990's and the 2000's have played an outsized role in shaping the new tax legislative process: . . . first, the emergence both of sharp polarization between the Republican and Democratic coalitions and of strong cohesion within those coalitions; second, the re-establishment of central-

[63] Id. at 599.

[64] Id. at 556; Shaviro, note 60, at 4. R

[65] Doernberg & McChesney, note 59, at 926. R

[66] Doran, note 61, at 558. R

[67] Id. at 560.

[68] Id. at 559. While Doran adopts Shaviro's factors of legislator motivations of re-election, power and prestige, and good policy, he claims these motivations are better suited to explaining finer details rather than the broad goals of a particular piece of tax legislation. Id.

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ized chamber management, particularly within the House, and third, the relaxation of restrictions on the federal-budget process."[69]

Doran contends that the polarization between partisan coalitions and strong cohesiveness within them has led to "ideologically pure legislation."[70] This increased cohesiveness makes particularistic provisions unnecessary to secure individual votes, while greater polarization makes it more difficult to use such provisions in logrolling attempts to gain votes from the opposing party. On the centralization of chamber management, Doran claims that managerial power has been centered in the office of the Speaker of the House.[71] This represents a shift in agenda control, and therefore in content control, leading tax policy into the "realm of ideological and partisan politics."[72] Finally, on the loosening of restrictions on the federal budget process, Doran examines the statutory pay-as-you-go rules of the Omnibus Budget Reconciliation Act of 1990[73] and the reconciliation mechanism from the Congressional Budget Act,[74] which Congress has increasingly used to pass tax laws. The PAYGO rules "required that spending increases be offset by spending cuts but permitted tax expenditures to be offset either by spending cuts or tax increases."[75] This made it easier to pass new spending as tax expenditures. A reconciliation bill requires only a simple majority in the Senate to pass, which likely reduces the need to use special targeted tax provisions to buy off marginal legislators. In combination, Doran argues these developments have led to the decline of particularism in tax legislation.

The two commentaries examine Doran's narrative of the current tax legislative process as tax gridlock punctuated by the occasional passage of ideologically pure legislation and his explanations for these developments. In his commentary, Victor Fleischer focuses on the tax legislative practice of renewing tax breaks scheduled to expire through bills called tax extenders.[76] He notes that the passage of tax extenders would seem to contradict Doran's view of the legislative process, as tax extenders are both frequent and highly-particularistic.[77]

Fleischer's key insight is that tax extenders facilitate tax policy gridlock because they allow the tax-writing committees to continue their work without interrupting the ideological battle in Congress.[78]

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[69] Id. at 588.
[70] Id. at 591.
[71] Id. at 599.
[72] Id. at 593.
[73] Pub. L. No. 101-508, § 13204, 104 Stat. 1388, 1388-616 (1990).
[74] Pub. L. No. 93-344, § 310, 88 Stat. 297, 315-16 (1974).
[75] Doran, note 61, at 596. **R**
[76] Victor Fleischer, Commentary, Tax Extenders, 67 Tax L. Rev. 613 (2014).
[77] Id. at 616.
[78] Id. at 617.

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This practice allows committees to shape tax policy in small ways, though limited to expiring legislation. As both political parties have an interest to protect tax extenders, the extenders achieve informal "must pass" status.[79] Budget concerns also make tax extenders an attractive option, as temporary tax legislation has lower expenditure estimates than permanent legislation, and sunset provisions allow for even more favorable treatment. Not surprisingly, Fleischer observes that this combination is one that legislators have found "too useful to discard."[80]

The tax extender process provides additional benefits to committee members. While Doran contends that public choice theory's explanatory power has declined in the current legislative process, Fleischer finds that the practice of auctioning off favorable tax legislation is alive and well. It is just concentrated in the tax extender space as the continual termination of tax benefits and burdens allow legislators to extract campaign contributions on a recurring basis.[81]

In his commentary, Jason Oh questions whether the increase in tax gridlock and decrease in the particularistic nature of tax legislation are really "two sides of the same coin," in that the same set of explanations can explain both trends.[82] Oh contends that it is useful to disentangle questions of the possibility of legislation (tax gridlock) from the content of the legislation (decrease in particularity).[83] Unlike Doran, he concludes that the two trends are best analyzed separately.

Oh's primary focus is on tax gridlock. First, he observes that there are several reasons why Congress may not enact legislation, and that the Doran framework accounts only for some of them.[84] Gridlock can occur when current policy aligns with the preferences of most legislators or after a new law is passed if legislator preferences remain stable.[85] Gridlock can also result when key legislative actors have different policy preferences. Doran's framework is helpful in understanding the latter explanation, in that political polarization and centralized congressional leadership make legislative action difficult. But the Doran framework fails to consider that legislative inaction may reflect legislative preferences.[86] If, as Oh contends, much of the tax gridlock over the current period stems from these two benign explana-

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[79] Id. at 613.

[80] Id. at 621.

[81] Id. at 622.

[82] Jason Oh, Commentary, Diagnosing Gridlock: A Response to Professor Doran, 67 Tax L. Rev. 627, 627 (2014).

[83] Id.

[84] Id. at 627–28.

[85] Id. at 632.

[86] Id.

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tions, then separate treatment of the issues of increase in gridlock and decrease in particularity seems justified.

Oh examines the gridlock issue through the pivotal politics model, which focuses on the preferences of key legislative actors who control vetoes in the legislative process.[87] Pivots include both the president and the members of the legislature. For example, the sixtieth Senator would be the filibuster pivot on a tax bill as his support is necessary to avoid a filibuster. By examining pivotal preferences from mid-term elections, Oh finds that legislative inaction likely results from lack of movement in the pivots rather than other causes.[88]

Oh concludes with a discussion of Doran's claim that tax legislation has become more ideologically pure and less particularistic.[89] Like Fleischer, Oh focuses on Congress' increased use of temporary tax legislation. Oh finds that tax extenders contain hidden particularistic provisions that make tax legislation seem misleadingly short.[90]

A key part of the politics of taxation scholarship focuses on the preferences of individual voters.[91] In a classic article, Allan Meltzer and Scott Richard examine growth of the size of government through a model that assumes that linear taxes are levied against income and that all tax receipts are spent on goods benefiting all citizens equally.[92] With these assumptions, they show that the so-called median voter will prefer higher taxes as long as the marginal benefit from increased government spending exceeds the marginal costs of taxes. With the expansion of the right to vote to a larger portion of the population, taxing and spending preferences will change. The median voter model predicts that more unequal societies will have higher levels of taxation and more redistribution. This median voter model, however, has fared rather poorly in predicting the level of redistribution given different levels of inequality in a society.[93]

Some scholars have rejected the rational choice approach and adopted models that follow in the behavioral economics tradition. Here altruism, social norms, values, and beliefs play an important role

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[87] Id. at 632–38.

[88] Id. at 634.

[89] Id. at 641–42.

[90] Id. at 643–44.

[91] For a discussion of how voter preferences shape legislative outcomes, see Anthony Downs, An Economic Theory of Democracy (1957).

[92] Allan H. Meltzer & Scott F. Richard, A Rational Theory of the Size of Government, 89 J. Pol. Econ. 914, 915-17 (1981).

[93] See Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, Why Hasn't Democracy Slowed Rising Inequality, J. Econ. Persp., Summer 2013, at 103, 104; Malte Luebker, Income Inequality, Redistribution, and Poverty: Contrasting Rational Choice and Behavioral Perspectives, 60 Rev. Income & Wealth 133 (2014); Thomas Romer & Howard Rosenthal, The Elusive Median Voter, 12 J. Pub. Econ. 143 (1979).

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in determining the tax system in a particular country.[94] Voters' beliefs matter, even when they are factually challenged. A variety of factors influence voters' preferences for tax and spending policies, and perceptions, values, and beliefs may result in voters supporting policies that appear to be against this rational economic self-interest.[95]

The article by Andrea Campbell examines how, if at all, attitudes towards taxes held by different groups in society changed during the Obama era.[96] While Campbell identifies several possible reasons why Americans' attitudes towards federal taxes might be particularly distinctive during President Obama's term, she finds that their attitudes were largely consistent with historical trends.[97] This result is surprising in light of Obama's campaign promises of addressing inequality through higher taxes on the wealthy and his expansive and expensive plans to improve education and reform health care.[98] Such plans, if adopted, would increase current or future tax burdens. In addition, the brutal recession and era of increased political polarization could have affected tax attitudes, particularly as both ordinary and wealthy taxpayers' income and wealth declined. But despite the campaign promises, economic challenges, and increased polarization, tax attitudes by income level and by party remained at roughly historic levels.[99]

Campbell's article also presents an interesting analysis of the interrelationship of racial attitudes and tax attitudes. President Obama's position as the nation's first African-American president may contribute to the racialization of issues, including attitudes towards taxes. Here, Campbell notes that politicians may strategically link racial attitudes and tax attitudes to help push conservative politicians into office.[100] After the New Deal, a new conservative notion "which blamed poverty not on the system but on the shortcomings of poor individuals" created a fear among lower income whites that their tax dollars would be spent on these poor individuals (generally seen as black), a fear that Republicans were able to leverage.[101]

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[94] See Alberto Alesina, Edward Glaeser & Bruce Sacerdote, Why Doesn't the United States Have a European-Style Welfare State?, 2 Brookings Papers on Econ. Activity 187 (2001).

[95] Larry M. Bartels, Unequal Democracy 98-161 (2008).

[96] Andrea Campbell, Tax Attitudes in the Obama Era, 67 Tax L. Rev. 647 (2014).

[97] Id. at 659–60.

[98] See Obama For America, Blueprint For Change: Obama and Biden's Plan for America 24-25, 33-34, 42-43 (2008).

[99] Campbell, note 96, at 660–61.

[100] Id. at 662. For a review of the strategic linkage of taxation and race, see Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics (1991).

[101] Campbell, note 96, at 662. R

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Campbell found from General Social Survey data that racial attitudes were connected to tax attitudes, in that racial conservatives were more averse to federal taxes than racial liberals.[102] The difference between the two groups grew especially large in 2008 when it became clear that Obama would likely become president.[103] The relationship between racial attitudes and tax attitudes, however, had returned to historically typical levels by 2010, once he had taken office.[104]

So what explains this remarkable non-event? A large part of the explanation may be the realization that Obama was likely to continue the existing tax policy for most Americans. Historically, Americans' attitudes toward the federal income tax closely track the level of tax burdens.[105] Several events early in Obama's term affected the feasibility of delivering on his campaign promises and his power to implement his plans. The severe economic downturn of the Great Recession limited options that might contribute to reduced economic activity. Two rescue plans approved by the Bush administration went into effect under Obama's administration: the Troubled Asset Relief Program (TARP)[106] and the auto industry bailout.[107] In early 2009, Congress passed The American Recovery and Reinvestment Act, setting aside $787 billion "to tax cuts, infrastructure spending, and budgetary relief for states and safety net programs."[108] The result was tax reductions rather than increases for almost all taxpayers.

Campbell notes that with the planned expiration of the Bush tax cuts in 2010, Obama might have been able to increase taxes on the wealthy and extend tax cuts for other taxpayers.[109] The Republicans gained control of the House of Representatives in 2010, however, and Congress passed the 2010 Tax Relief Act, extending the Bush cuts for two more years (until January 1, 2013).[110]

The combination of the expiration of the Bush tax cuts and sequestration created a "fiscal cliff" that "threatened to throw the nation's

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[102] Id. at 664–65.

[103] Id. at 667.

[104] Id. at 666.

[105] Id. at 648.

[106] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, tit. I, 122 Stat. 3765, 3767-800.

[107] David E. Sanger, David M. Herszenhorn & Bill Vlasic, Bush Aids Detroit, But Hard Choices Wait for Obama, N.Y. Times, Dec. 20, 2008, at A1.

[108] Campbell, note 96, at 649. R

[109] Id. at 652.

[110] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, tit. I, 124 Stat. 3296, 3298-99. With continued low taxes and the debt ceiling still an issue, the Budget Control Act of 2011 created a committee to reduce the deficit. If the committee failed to reach a consensus, the Act provided for automatic spending cuts by January 2, 2013. Budget Control Act of 2011, Pub. L. No. 112-25, 302, tit. IV, 125 Stat. 240, 256-66.

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economy back into turmoil."[111] In response, Congress passed the American Taxpayer Relief Act of 2012 (ATRA), effective on January 1, 2013, to curb automatic spending cuts and provide for tax increases.[112] The 2012 Act finally accomplished what Obama had promised: It made the Bush tax cuts permanent for most Americans but increased the tax rates for individuals in the top two income brackets.[113] With higher tax burdens on some taxpayers, attitudes towards federal taxes may indeed change during the Obama administration—but we will have to wait a few more years to find out.

In his commentary, Edward McCaffery focuses on how well Campbell captures public attitudes towards taxes during the Obama era.[114] While McCaffery praises Campbell's methodology and analysis, he concludes that Campbell findings may be of limited usefulness because of the limitations in the questions (or more precisely, the single question) she is compelled to use in her analysis.[115] So while Campbell does the best she can with limited survey information, McCaffery calls for a broader approach to determine what ordinary Americans think of taxes.

McCaffery notes that Campbell's analysis rests on a single survey question: *Do you consider the amount of federal income tax you have to pay as too high, about right, or too low?*[116] This approach has an advantage in that it allows comparisons among survey responses across a long time period (1947 to 2012). The disadvantage is that it may fail to measure adequately either the public's current attitudes towards taxes or how these attitudes change over time.

McCaffery offers several reasons why this single survey question fails to capture public attitudes toward taxes. For example, while federal income tax burdens have remained relatively stable (as a percentage of GDP), payroll tax burdens have increased substantially. McCaffery notes the difficulty of determining whether the survey question is picking up attitudes towards total federal taxes or the income tax alone.[117] Building on his background in behavioral economics, McCaffery also finds that framing and isolation effects, as well as primes and prompts, may influence and distort public attitudes towards taxes.[118]

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[111] Campbell, note 96, at 653. **R**

[112] Pub. L. No. 112-240, 126 Stat. 2313 (2013).

[113] Id. § tit. I, 126 Stat. at 2315-23.

[114] Edward J. McCaffery, Commentary, Are We Asking the Right Questions?, 67 Tax L. Rev. 669 (2014).

[115] Id. at 670.

[116] Id. at 673; see Campbell, note 96, at 655. **R**

[117] McCaffery, note 114, at 673. If survey respondents also consider their state and local tax burdens, the picture gets even murkier.

[118] Id. at 673–74.

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McCaffery expected that attitudes towards taxes would change in the Obama era, particularly when looking at attitudes across partisan, income, or racial lines.[119] But despite the political and economic changes, tax attitudes remained relatively stable. So both Campbell and McCaffery seek to understand the dog that did not bark. While McCaffery agrees with Campbell that the principal reason for unchanging attitudes is that tax levels for individuals stayed relatively constant, McCaffery finds an additional explanation: "People just do not think very much, or very well, about taxes."[120] He notes that Americans are generally uninformed about matters of tax policy and what they do know may be determined by "looking only to one salient dimension of a public policy issue, ignoring or underweighting all else."[121]

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[119] Id. at 671.
[120] Id. at 674.
[121] Id. at 675.

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